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No. 91-373

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ANGEL FIGUEROA VIVAS,

Petitioner,

v.

PUERTO RICO,

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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October 8, 1991

QUESTIONS PRESENTED

Whether this Honorable Court has jurisdiction to review the Judgement of the Supreme Court of Puerto Rico issued in this case when:

1. The alleged federal questions raised by petitioner were not properly or timely presented in the proceedings before the Supreme Court of Puerto Rico and were not addressed by that Court in its Opinion and Judgment.

2. The questions presented by petitioner are not substantial federal questions that warrant the exercise of this Court Certiorari jurisdiction.

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**BRIEF IN OPPOSITION
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STATEMENT OF THE CASE

The petition for Certiorari docketed herein stems from the assassination by Puerto Rican police on July 25th, 1978 of two young advocates of independence for Puerto Rico. The events occurred on a remote mountain in rural Puerto Rico, Cerro Maravilla, where the deceased were led by an undercover agent of the Puerto Rico Police, presumably to commit acts of terrorism, although, they were woefully ill-equipped for the task.¹

¹ These young men had in their possession a pair of gloves, two handguns, a sky mask, a package of solid charcoal starter and a box of matches.

Minutes after the assassinations at a parade for the official celebration of Commonwealth Day, the governor of Puerto Rico at that time, Carlos Romero Barceló, promptly labeled the policemen present at Cerro Maravilla "heroes". Later, after controversies arose in the press over the official version of the police, two investigations were conducted by the Puerto Rico Department of Justice which absolved the policemen from responsibility and held that they had acted in self defense. Two investigations by United States Department of Justice reached the same results.

Unconvinced by the results of these probes and alarmed by their unprofessionalism and by the egregious contradictions in the testimonies of ocular witnesses, the Puerto Rico Senate decided to launch its own investigation of the matter.² The Judiciary Committee of the Senate promptly hired an experienced investigator, who for more than two years labored quietly but tenaciously, interviewing witnesses, gathering evidence and reviewing the reports of the four previous local and federal probes. Thereafter, the results of his investigation were presented to the Committee, via televised hearings. For a judicial

² See e.g. *In Re San Juan Star*, 662 F.2d. 108 (1st Cir. 1981); *Colón Berríos v. Hernández Agosto*, 716 F.2d 85 (1st Cir. 1983); *Hernández Agosto v. Carlos Romero Barceló*, 748 F.2d 1 (1st Cir. 1984). The opinions of the Supreme Court of Puerto Rico related to the so-called Cerro Maravilla case, apart from the judgment herein presented for review include the following: *Soto v. Srio. de Justicia*, 112 D.P.R. 477 (1982); *Peña Clos v. Cartagena*, 114 D.P.R. 576 (1983); *Romero Barceló v. Hernández Agosto*, 115 D.P.R. 368 (1984); *People v. Pérez Casillas*, 117 DPR 380 (1986); *People v. González Malavé*, 116 D.P.R. 578 (1985); *People v. Pérez Casillas* and *Moreno Morales*, June 29, 1990.

recognition of the impact of these hearings on the Puerto Rico public opinion, see *Colón Berríos v. Hernández Agosto*, 716 F.2d 85, 86 (1st Cir. 1983).

The Senate investigation completely destroyed the conclusions of the four official probes. Relying on the testimony of ocular witnesses whom the previous local and federal investigators had slighted or disbelieved, of expert witnesses and of three policemen who participated in the Cerro Maravilla stake-out and testified under immunity, the Senate proved to all who wanted to see and hear that the policemen in Cerro Maravilla had apprehended the young men, beat them up and executed them by firing squad while the victims knelt, handcuffed. The investigation, moreover, showed conclusively that there had been a *cover-up at the local level* and raised the distinct possibility of cooperation by federal personnel in the cover-up.

As a result, the federal government launched a third investigation which culminated in criminal indictments against ten policemen who were active participants in the Cerro Maravilla operation. These policemen were convicted of perjury in depositions taken in federal proceedings and most are at present serving jail sentences. Also, as part of the Senate of Puerto Rico report on its investigation, the President of the Senate filed on May 13, 1984 in the Supreme Court of Puerto Rico a Complaint against petitioner and other prosecutors for unethical conduct incurred while participating in the Puerto Rico Department of Justice investigations of the murders at Cerro Maravilla. Thus, the disbarment proceedings which culminated in the permanent separation of the petitioner from the practice of the profession of law was initiated.³

³ A long time ago, the Supreme Court of Puerto Rico claimed

On June 5, 1984, the Supreme Court designated a panel of special examiners for the evaluation, formulation and sustainment of formal charges for improper professional conduct which would appear to be pertinent in this case. The panel was to submit to the Supreme Court a report upon which the Supreme Court would determine whether probable cause existed for the initiation of formal disciplinary proceedings against petitioner and other prosecutors. Appendix D to the Petition, page 163.

On January 18, 1985, the Legislature of Puerto Rico approved Law Number 1 to create the Office of Special Independent Prosecutor to investigate and criminally prosecute the persons who could have committed crimes in connection to the incident of Cerro Maravilla "and to carry out all pertinent civil administrative and professional ethics actions", related to Cerro Maravilla. The Statement of Motives of Law Number 1 states that the Special Independent Prosecutor shall examine "the actions of the highest ranking officials within the governments criminal investigation hierarchy" due to the "serious irregularities uncovered by the Senate in the previous criminal investigations." Appendix E of the Petition, page 166-167; Section 6 of the Law granted the Special Independent Prosecutor exclusive jurisdiction to investigate and prosecute those criminal, civil, administrative "and professional ethics actions -be deems appropriate", including those that had already begun.

its inherent power to discipline the members of the judicial profession and it has now become an establish element of Puerto Rican Law. See, *In Re Torres*, 30 D.P.R. 267, 268 (1922); *In Re Abella*, 67 D.P.R. 229, 238 (1947); *Colegio de Abogados de Puerto Rico v. Barny*, 109 D.P.R. 845, 847-48 (1980).

Appendix to the Petition, page 182. On March 14, 1985 the Supreme Court, pursuant to the terms of Law 1 and "to prevent undue duplicity or conflicts in the investigation or ulterior process in this matter" ordered the Special Independent Prosecutor to assume all the responsibilities regarding the disciplinary action against petitioner and the other prosecutors. Appendix to the Petition, page 187.

Thereafter, on October 7, 1986 the Supreme Court dismissed the complaint against one of the prosecutors and ordered the Special Independent Prosecutor to proceed to file disciplinary charges against petitioner and others. Appendix to the Petition, page 199. The charges were filed and answered by petitioner and others. On December 15, 1986 the Supreme Court of Puerto Rico appointed superior Court Judge Abner Limardo as Special Commissioner to hear and receive the evidence that the parties may offer regarding petitioner's and the other prosecutors professional conduct. The Special Commissioner held hearings for 24 days (see Appendix to the Petition, page 7 n.4), in which petitioner in particular did not present any witnesses. See Appendix to the Petition, page 141 n.9. The Special Commissioner submitted his report to the Supreme Court on May 21, 1987 and after the transcription of the evidentiary hearings and the submission of objections and comments to the report by petitioner and other prosecutors and finally the eliminate parties conclusions and arguments, the matter was considered submitted for the consideration of the Supreme Court of Puerto Rico. See Appendix to the Petition, pages 8-10.

On February 21, 1991 the Supreme Court of Puerto Rico issued its opinion and order regarding the dis-

ciplinary proceedings against petitioner and the other prosecutors.⁴ After an exhaustive analysis of the Special Commissioner's report, pertinent documents and transcripts of evidence, the Supreme Court concluded that petitioner Figueroa Vivas had incurred in grave unethical conduct. In particular, the Supreme Court concluded that Figueroa Vivas had coerced a witness and "exercised over him undue pressure" for him to alter his statement and later destroyed part of the initial sworn statement that the witness had given. The Supreme Court also concluded that together with another prosecutor, Colton Fontán, petitioner Figueroa Vivas offered the witness a job and later without prior notice went to the witness house and "threatened him with formally charging him with several crimes if he did not alter his statement". Appendix to the Petition, page 148. The Supreme Court concluded:

We do not harbor any doubts that the respondents Colton Fontán and Figueroa Vivas incurred, individually and concertedly, in a conduct tending to orient the investigation towards the theory of self-defense of the Police. In this task, they were successful for a limited time. To reach it they improperly in-

⁴ The Supreme Court states that the resolution of this disciplinary proceedings required the "patient reading and evaluation of a transcript of evidence in excess of three thousand (3,000) pages and the conscientious and careful analysis of documentary evidence consisting of two hundred and thirty three (233) exhibits corresponding to numerous sworn statements, photographs, notes, newspaper clippings, video cassettes, etc." The Supreme Court explained that this "monumental task" was simplified by the excellent report of the Special Commissioner. See Appendix to the Petition, page 10-11.

tervened with several witnesses and managed to change their testimony. Their conduct was an affront against basic ethical principles. Not only do they deserve our repulsion and censure, but the imposition of the severest disciplinary sanctions.

The Supreme Court decreed the permanent separation of petitioner Figueroa Vivas from the practice of the profession of law in the Commonwealth of Puerto Rico.

These are the facts which gave rise to the instant petition. Petitioner Figueroa Vivas, in the official performance of his duties as Director of the Special Investigations Bureau of the Department of Justice during the first investigation of Cerro Maravilla conducted by the Puerto Rico Department of Justice, was an integral part of a concerted effort to cover up the truth of what had really occurred in that remote mountaintop. Indeed, even at this late stage in his Petition before this Honorable Court and after the facts of Cerro Maravilla had been proven beyond a reasonable doubt in many different forums, petitioner still talks about a new "version" of what happened at Cerro Maravilla. Even the Supreme Court of Puerto Rico was surprised by the allegations of law of Figueroa Vivas because it gave the impression that he still questions "the credibility of certain witnesses which contributed to bringing the truth of what happened to the surface". Appendix to the Petition, page 130. In short, petitioner, an attorney, was an integral part of a conspiracy by the government of the Commonwealth of Puerto Rico in 1978 to cover up two vicious murders committed by the police at Cerro Maravilla.

ARGUMENT

1. This Court has no Jurisdiction to Review the Judgment of the Supreme Court of Puerto Rico by way of Certiorari for the Following Reasons:
 - a. The alleged federal questions raised by petitioner were not properly or timely presented before the Supreme Court of Puerto Rico and were not addressed by that court.

In order for this court to have jurisdiction over the federal questions raised in the Petition for Certiorari the question must have been properly and timely presented in the State Court proceedings. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); *Illinois v. Be-gates*, 462 U.S. 213, 218-20 (1983). A perfunctory examination of the opinion and judgment of the Supreme Court of Puerto Rico, which the petition asks this Court to review, reveals that the Court failed to pass expressly upon any federal question. The Court's decisions on the issues of law presented by petitioner and the other prosecutors was based exclusively on Puerto Rican law and cases. This court has held several times that when "the highest state court has failed to pass upon a federal question it will be assumed that the omission was due to lack of the proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary". *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974); *Street v. New York*, 394 U.S. 576, 582 (1969). This presumption is the reason for the requirement of Rule 21.1(h) that the petitioner seeking review of a State Court decision must specify in the Statement of the Case "the stage in the proceedings, both in the court of first instance and in the appellate court,

at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; . . .". Petitioner has failed to comply with Rule 21.1(h). With one exception, petitioner does not identify the stage and method in which the questions presented to this court were raised in the proceedings below and the way in which they were passed upon by the Supreme Court of Puerto Rico.

Indeed, the one exception to this failure by the petitioner is misleading and fails to comply with the requirement of proper and timely presentation. This exception refers to the question presented in the petition regarding the fact that the law clerk of one of the judges of the Supreme Court of Puerto Rico was the daughter of the attorney from the Special Independent Prosecutor's office that handled these disciplinary proceedings. The petition states that on March 21, 1991 "counselor Felipe Benicio Sánchez on behalf of Pedro Colton Fontáñez, one of the prosecutors charged with disciplinary action" filed a motion before the Supreme Court of Puerto Rico requesting the reconsideration of the judgment on the ground stated above. This fails for the obvious reason that the alleged "federal question" was presented to the Supreme Court of Puerto Rico, not by petitioner, but by one of the other prosecutors charged with unethical conduct.

Apart from petitioners failure to comply with the requirements of Rule 21.1(h) the fact is that, with one exception, none of the other federal questions presented for review were even arguably properly or timely presented in the proceedings below. The alleged political motivation of the proceedings below,

question whether two judges of the Supreme Court should have disqualified themselves because they had been campaign directors for a gubernatorial candidate, and the question of whether the decision of the Supreme Court of both probable cause and judgment on the merits is a violation of petitioners due process, were never presented in the proceedings below.

The only question presented in the petition that could have been arguably presented in the proceedings below is whether the procedural change in the proceedings provoked by the approval of the law creating the office of the Special Independent Prosecutor constitutes a violation of petitioners due process rights under the Constitution of the United States. The fact is, however, that this question was also not properly and timely presented to the Supreme Court of Puerto Rico. In a motion titled "Motion Concerning Constitutional Questions", filed in the Supreme Court of Puerto Rico on July 23, 1987 petitioner states that "in the application of the referred law (the law creating the Office of the Special Independent Prosecutor) the due process of law of the respondent has been breached (guaranteed by the Constitutions of the Commonwealth of Puerto Rico and the United States of America)". Appendix to the Petition, page 254. Further, the motion states that the same law "constitutes an *ex-post-facto* law and violates the Constitution of the United States of America and of the Commonwealth of Puerto Rico". Again, in the same motion, petitioner states that in the application of the same law, the Special Prosecutor, "violated the due process of law of the here in respondent guaranteed by the Constitution of Puerto Rico and that of the

United States of America". Appendix to the Petition, page 255.

The proper presentation of a federal question in a State Court proceeding requires a reference to the particular clause of the Federal Constitution or statute relied upon as well as sufficient allegations regarding the rights claimed thereunder. The Supreme Court has held insufficient a mere reference to the "Constitution of the United States" or "due process of law". *Bowe v. Scott*, 233 U.S. 658, 664-65 (1914); *Brady v. Maryland*, 373 U.S. 83, 91 (1963) (separate opinion of Mr. Justice White). In *Ellis v. Dixon*, 349 U.S. 458, 460-62 (1955) this Court held that the claim that a particular organization had been the subject of unequal protection of the laws in violation of the Fourteenth Amendment was insufficiently presented in the proceedings below in the absence of an allegation that similar groups had been given more favorable treatment. It is obvious that petitioner general references in the proceedings below to "due process of law" and "the Constitution of the United States of America" or to the fact that the law creating the office of the Special Independent Prosecutor constitutes "*an ex-post-facto law*", are not sufficient for the proper presentation of a federal question in the proceedings below. There is no reference to any particular clause of the Federal Constitution, no explanation of why petitioners due process right have been violated and no indication of how a procedural change prejudiced petitioner in the proceedings below.

b. The questions presented in the Petition do not raise a substantial question.

The questions presented for review in the Petition do not present a substantial federal question. Indeed,

in our view, only two questions, merit any discussion whatsoever. The questions of alleged political motivation and the alleged need for judges of the Supreme Court to disqualify themselves from the proceedings below are totally frivolous.

The two remaining issues are easily disposed of. First, defendants alleges that the approval of Law Number 1 creating the Office of Special Independent Prosecutor changed the ongoing disciplinary proceedings below and constituted an *ex post facto* application of the law in violation of his due process rights. He failed however, to indicate in what way was he prejudice by the change. When procedural changes have been challenged as invalid under the *ex post facto* constitutional ban this Court has compared the old and new "statutory procedures *in toto* to determine that the new may be fairly characterized as more onerous". *Dobbett v. Florida*, 432 U.S. 282,294 (1977). Law Number 1 changed nothing. As the Supreme Court of Puerto Rico stated in the opinion below, the statute "simply transferred the office of the Solicitor General to that of SIP [Office of the Special Independent Prosecutor] the investigative task and of processing the presentation and the processing of the complaint". Appendix to the Petition, page 142.

Second, the argument that his due process rights are violated because the Supreme Court of Puerto Rico determined probable cause against petitioner and then passed judgment on the charges of unethical conduct is equally untenable. The contention that the combination in the same body of the function of determining probable cause and deciding on the merits, without more, is violative of due process has been clearly rejected by this Court. In *Withrow v. Larkin*,

421 U.S. 35, 56 (1975) the Court held that judges who issue arrest warrants or preside at preliminary hearings for determination of probable cause were not barred from presiding over the criminal trial on the merits.

Finally, petitioner's attempt to portray himself as victim was eloquently answered by the Supreme Court of Puerto Rico in the following words:

In so ruling, we are conscious that this type of process generates anguish and uneasiness. The action of itself, as well as the transpiration of time—it is easy to suppose—must have emotionally hurt the desired tranquility which we all desire. However lamentable that this reality may be, same is the consequence of the minimum rigor in a system of justice oriented towards the search for the truth and the imperative of fixing responsibilities.

Certainly, ultimately, this scene is more painful for him who does not fulfill his duties as a public officer. All this state of mind is unavoidable; a logical consequence of the illegal and unethical conduct of any person, whether it be a private citizen or an attorney or public official.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied.

RESPECTFULLY SUBMITTED.

At San Juan, Puerto Rico, on October 8, 1991.

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